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Mr. B E N F I E L D's C L A I M S;

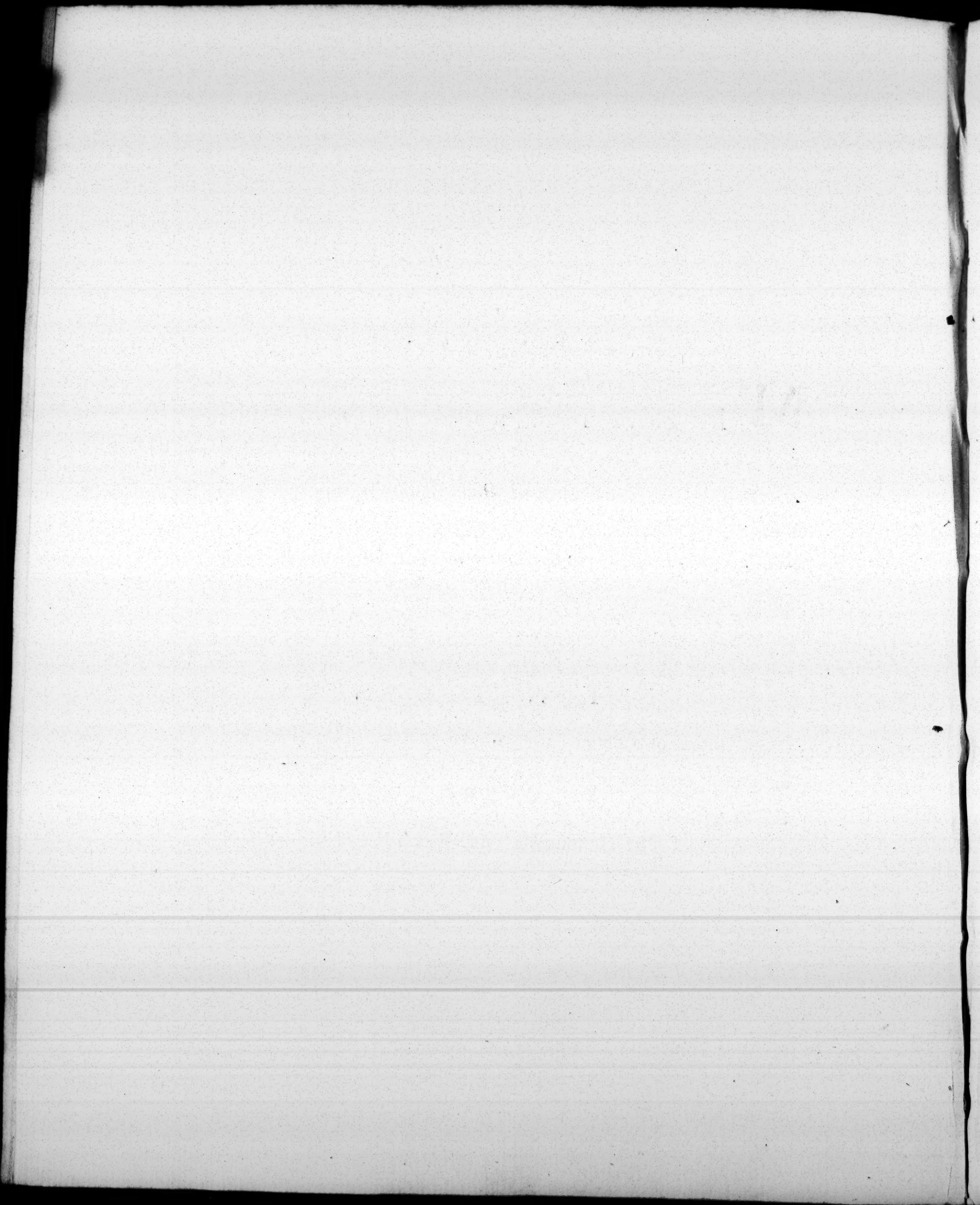
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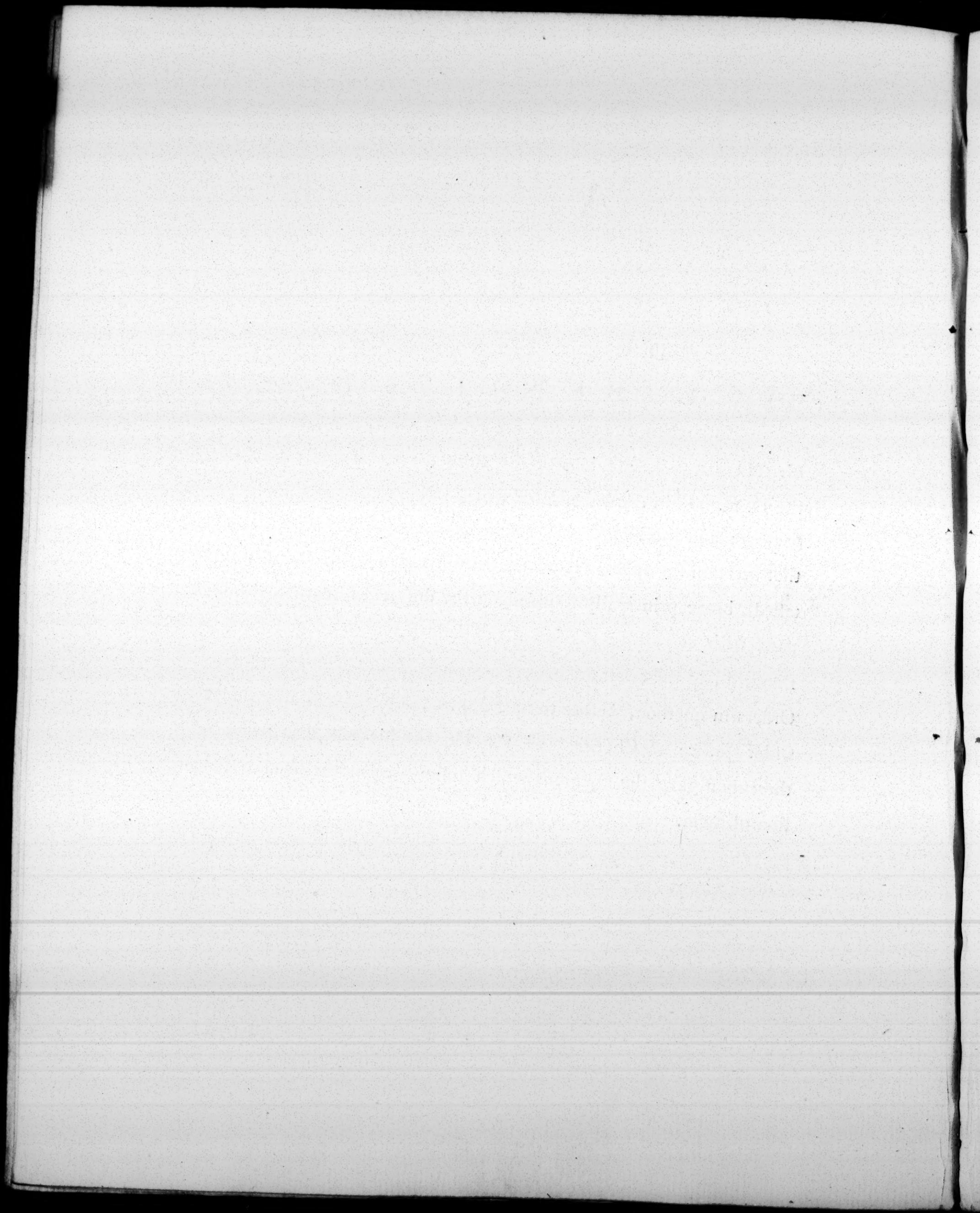
M R. A T T O R N E Y G E N E R A L, M R. K E N Y O N,

and The Honourable M R. E R S K I N E.



A D V E R T I S E M E N T.

MR. BENFIELD having taken the Opinions of Lord LOUGHBOROUGH, Mr. DUNNING, Mr. MACDONALD, and Mr. HARGRAVE, previous to the Report made by the Committee to the Directors, in consequence of which Report he was restored to the Service; and the Dissent of those who differed from the Majority on that occasion (as appears from the sentiments of such of them as protested), being principally founded on the different Orders of the Company with respect to the Loans of their Servants in the East, Mr. Benfield laid the different Letters and Instructions, containing all the Orders in question, before the ATTORNEY GENERAL, Mr. KENYON Chief Justice of Chester, and the Honourable Mr. ERSKINE; who thereupon gave the Opinions which follow, upon the legal construction of them.



C A S E

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P A U L B E N F I E L D, E S Q.

&c. &c.

AS the legality of the Loans made by Mr. Benfield to the Nabob of Arcot, has lately been called in question, upon a supposition that they are contrary to the Orders of the Company;

Mr. Benfield, though he is not conscious of having acted, in any instance, contrary to the Orders of his Employers, yet wishes to have the opinion of Counsel upon the whole of the transaction in which he has been engaged with the Nabob.

In order to obtain which, he will first state to his Counsel the Orders of the East India Company upon the subject of Loans, and then state the fact with regard to the Loans made by him.

The first Order of the Company upon the subject of Loans, was in the infancy of the Company, in the year 1714.

Extracts of the Honourable Court's Letter, dated Sept. 27, 1714.

" We very well like the injunctions mentioned in the 77th paragraph of your Letter, by the London, to all our people—That none of them have any dealings with the Country Governments in money matters ; and earnestly desire this may be frequently repeated to all places, as our standing irreversible Order, never to be broken on any occasion."

This Order, though it remained upon the Records of the Company, was never (as far as can be learned) put in execution.

The situation of the Company, in respect to Country Powers, has undergone a total change. The acquisition of territory and power, and an alteration of circumstances, have rendered many Orders useless and forgotten, which might have useful in a different situation of the Company's affairs.

The Company, and their Servants both at home and abroad, were, for near half a century, in the daily practice of seeing this Order broke through, without censure or blame. In this situation matters stood, till the year 1766, when, in consequence of some extortions committed by the Company's Servants in India, it became necessary to lay down some rules to prevent such extortions in future. In the year 1766, the following Orders were sent to India :

Extract of a Letter to Fort St. George, 17th May 1766.

" Having reason to believe that many of our Servants have received presents or gratuities from the Nabob, his Ministers, and others, in a collusive

collusive manner, by way of exorbitant interest on monies lent, or said to be lent, by our Servants: In order, therefore, to put a stop to such extortions and exactions, for in that light we see them, We do hereby order and direct, that in future if any of our Servants, civil and military, shall, directly or indirectly, demand, accept, or receive, from any person or persons whatsoever, for the loan of any sum or sums of money, real or nominal, under the Presidency of Fort St. George, or in any other part or province in India, (excepting only such money as he or they may, from time to time, lend on Respondentia,) any kind of premium, gratuity, or advantage whatsoever, over and above £. 10 per cent. per annum interest, such Servant, upon being convicted thereof, let his rank or station be what it may, is forthwith suspended from the Company's service, and sent to England."

*Extract of the Company's Letter to the Select Committee at Fort St. George,
dated the 17th of March 1769.*

Par. 9. " In our letter to the separate department under this date, we have testified our great surprise at the reports that are circulated, of the amount of the Nabob's debt to individuals, being more than twenty lacks of pagodas; and that the Governor and Council act as trustees for the recovery of the same, and as such are in possession of the collection of the revenues of great part of the Carnatic.

10. " Ignorant as we are of the rise of this debt, and the truth of these reports, we cannot but be suspicious, that the interest of the Company is much wronged thereby.

Par. 11. " We are alarmed, lest this debt to individuals should have been the real motive for the aggrandizement of Mahommed Ally ; and that we are plunged into a war, to put him in possession of the Mysore revenues for the discharge of the debt ; nor are we without apprehensions, that the revenues collected by the Nabob, in the Carnatic, and the new conquests, may be applied to the discharge of this debt, instead of being applied to the support of the war.

12. " If the report of the trust vested in the Governor and Council is true, we cannot consider it in any other light than a total inversion of the nature of our service. It is avowing private interest diametrically opposite to the Company's, and in a case where they must continually come in competition. Charged on our part with the recovery of a debt due from the Nabob, for supporting him in a war during almost twenty years, how can our Servants, consistent with their duty and fidelity, neglect the discharge of so great a public trust, or suffer any interest of their own to come in competition with it ? Or how can they dare to employ the forces, influence, and authority of the Company, in collecting the revenues of the Nabob mortgaged to themselves ? The honour and dignity of the Company is so materially affected by those proceedings, that we expect you to impress our Servants with the due sense of the distinction which arises between private and public interest, so diametrically opposite in this instance ; and how incompatible their conduct is with the character of faithful Servants to the Company ; and therefore the first step you are to take, is, to demand from them a renunciation of all the power and authority given them by the Nabob, for the collection of any part of his revenues for his debts to individuals ; for we cannot suffer the idea of such a right to be entertained, either by the Nabob, or by our Servants, in exclusion of ourselves. Having done this, you are then to demand from the Nabob an account

count of all his debts to the Servants of the Company, or inhabitants residing under our protection ; you are to examine them separately, and see that they are charged with no higher interest than after the rate of £ 10 per cent. from the day of the receipt of our Orders on that subject, under date of the 17th of May 1766. Par. 33.

Par. 14. “ Having adjusted these accounts, you are to let the Nabob know, his first obligation is to discharge his debt due to the Company. You are therefore to offer him your assistance, and, if necessary, even insist in the strongest manner on his entering into the detail of his revenues, and to point out to you what further resources he has for the discharge of his debts ; and to make the liquidation thereof a matter of public discussion between you and him, and give the sanction of the Company’s authority to the measures to be taken for the discharge of his debt to individuals, without which he can never be a useful Ally.

15. “ You are to be very minute in representing to us whatever can give any light into the rise and progress of this uncommon debt, and the measures you adopt for procuring the discharge of it.”

*Extract of the Company’s Instructions to the Commissioners, dated the
15th September, 1769.*

31. “ We fear great mischief has arisen from Loans of Money furnished by the Company’s Servants to the Nabob of Arcot. If the necessities of this Ally, or of any other, require aids and assistance of this kind, it is disgraceful in the Servants of the Company to take undue advantages of such circumstances ; and we desire you particularly to enquire into and

and investigate the source, progress, and extent of those debts and demands, and *for the future* to prevent all abuses and injustice in transactions of this sort.

In consequence of disputes between the Government and Council of Fort St. George and the private creditors of the Nabob in 1768 and 1769, when the private creditors were claiming a priority in the payment of the debt due to them, and refusing to comply with some regulations which the Governor and Council thought proper to lay down respecting the mode in which the Nabob's debts were to be paid; the Governor and Council of Fort St. George issued the following Order.

" Whereas the Honourable Court of Directors of the East-India Company did, in the year 1714, establish as a standing irreversible Order, never to be broken on any occasion, That none of their people shall have any dealings with the Country Governments in money matters :

" And whereas, notwithstanding the said Order, many transactions of that kind have, of late years, been suffered to pass unreproved:

" And whereas the Honourable Court of Directors, in their Orders to their President and Council on this coast, dated the 17th of May, 1766, speaking of the great sums of money which they understood to have been lent by their Servants, and others residing under their jurisdiction, to the Nabob of the Carnatic, *at a very high interest*, did order and direct, That, from the receipt of the said Orders, the rate of interest to be taken and received for Loans of Money should not exceed £. 10 per cent. per annum; but did not therein expressly repeat their prohibition of making loans to, or having money transactions with the Country

“ Governments ; whence some doubts have arisen, whether revocation
 “ of the above-recited Order of the year 1714 be not implied, and a
 “ permission tacitly given to make Loans, and have other money trans-
 “ actions with the Country Governments : That all doubts on this subject
 “ may be effectually removed, the President and Council do hereby
 “ declare, that they do consider the said standing Order of the year
 “ 1714 as unrevoked, and being in full force and vigour ; and in con-
 “ sequence thereof, they do hereby expressly forbid all Servants of the
 “ Company, civil and military, and all other Europeans residing under
 “ their jurisdictions, to hold any manner of correspondence, to make
 “ Loans, or to have any money transactions, of what kind soever the
 “ same may be, directly or indirectly, with any of the Princes, Rulers,
 “ or Governors of any of the Provinces or States in the East-Indies, or
 “ with any of their Ministers or Agents, *without the especial licence and*
 “ *permission of the President and Council for the time being.*

“ Except only in such cases as are explained in the Resolution of the
 “ President and Council, in Consultation of the 27th of March, 1769,
 “ which Resolution is in the following words :

“ It is ordered, That all correspondence and transactions with the
 “ Country Powers, their Ministers, or others, intrusted with any de-
 “ partment of Government or Revenue, be reserved, as formerly, to
 “ the President only at the Presidency, and to the Chiefs of Subordi-
 “ nates, touching the affairs of their respective Chiefships, who are to
 “ transmit copies of such correspondence to the President; excepting out
 “ of this general prohibition, such cases, wherein any of the Company’s
 “ Servants may be charged with any public affairs requiring such cor-
 “ respondence ; and excepting also all military officers on command,
 “ who are permitted to correspond touching the necessary affairs of
 “ such

" such command only ; provided that, in both cases, copies of such correspondence be transmitted, by the first convenient opportunity, to the President and Council, or to the Chief and Council, under whom such Servant, civil or military, shall act at the time.

" *Resolved*, That any wilful deviation herefrom, be deemed and construed a breach of Orders, and treated as such."

Extract of the Company's General Letter to Fort St. George, dated the 22d March, 1771.

Par. 18. " When we reflect on the inconveniences which have arisen in consequence of Colonel Wood's having an account current with the Nabob, we cannot but be of opinion, that such practice, if permitted, would at all times be detrimental to the service, and furnish the Commanding or other Officers with opportunities to dispose of plunder, or to introduce unreasonable or unnecessary charges. It is therefore our pleasure, that no Military Officer whatever do in future, on any pretence, open an account with the Nabob, or advance any money for which he must become accountable, unless such Officer shall first have received the express authority of our Governor and Council, or Select Committee, for so doing : Nevertheless, if at any time the case be urgent, and will not allow for such Officer or Officers to send to the Presidency for Orders, without subjecting the service to material inconvenience ; then, and in such case only, the Commander in Chief, or Commander of any division of the army, may act, according to his discretion ; but he must not fail to transmit to you, or to our Select Committee, by the first opportunity, a full and particular account of such his proceedings,

together

together with his reasons at large for not waiting for Orders, before he took such measures, as we wish may always be in the power of our Officers to avoid.

¶ Par. 19. " That you may not be at any loss for the latitude we are willing to allow, respecting the discretionary power of our Military on such occasions, we mean to confine it to his affording a temporary supply, in order to prevent the troops from suffering any great hardships for want of provisions; and that no person may plead ignorance of our commands in this respect, it is our further pleasure, that they be immediately given out in General Orders."

Extract of the Company's Letter to the Select Committee at Fort St. George, dated the 10th April, 1771.

12. " In our Letter to you, of the 30th November last, we directed, that you should, on no account, withdraw our troops from the fortresses which they garrison in the Carnatic; but as the subject appears to us of the utmost importance, we have, since that time, been induced to enter more fully into the consideration thereof; and, on the maturest deliberation, we see the greatest reason, not only to enforce our said Orders, but to signify to you our express disapprobation of the promise which you have made to the Nabob; and to issue our positive Instructions, that you do not, at any future time, give the Nabob the least reason to expect that such a measure can possibly take place. On tracing the subject minutely, we find, that no sooner was the Nabob put in possession of the said forts, and the Company's troops removed, than his own rebellious subjects were hardy enough to attempt retaking some of them; and their success shews, that they had little more to do than

appear before them, in order to obtain possession. On which account, the Nabob himself declared he was tired out with the frequent accounts received of the depredations of the plunderers, and that he was fully convinced his troops were utterly unequal to the task of suppressing them; he therefore desired a proper number of his Sepoys might be taken into the Company's service, put under our Officers, and disciplined like the rest of our troops; that the expence thereof should be defrayed by himself; and that, if the Company would agree thereto, and give strict Orders that our Officers should not interfere in the affairs of his revenue, he would dismiss all the troops he kept in the said countries, and depend on us alone for preserving the tranquillity of the Carnatic.

Par. 13. "We cannot but view such a request of the Nabob, and a compliance therewith on our part, to be as binding, all circumstances considered, as though the conditions were stipulated by a formal treaty; and therefore, unless the Nabob can urge with propriety (which we hope is not the case) that our military Officers have improperly interfered in the business of his revenues, we cannot conceive that he has even a right to expect us to recede from our part of the agreement.

14. "We wave entirely, at present, all consideration of the consequences which might naturally be expected to follow, should a compliance with the Nabob's request take place, because we are not at all disposed to make the dangerous experiment. But in order to convince the Nabob, that our troops shall be only used for his benefit, and that they shall not in the least interfere with his revenues, *We do hereby direct, that no Officer, or other person in our service whatever, do presume to lend, or by any means advance money to any of the Nabob's tenants or people, in the country where any such Officer or persons*

may happen to be; for we have reason to believe, that from such practice great evils have arisen. The Officer can, on the spot, in time of harvest, secure his own property, before the Nabob's Amuldars can possibly take care of the Revenue; and the high interest paid by the landholder, is a great temptation to the Commanding Officer, to engage him to lend money on the produce of such lands as lie within the reach of his guns, or the limits of his command. This being, as we believe, the principal source of almost all disputes between us and the Nabob on this subject, we are determined effectually to crush the evil; and do therefore direct, that you carry these our Orders into effectual execution, and dismiss every person from our service, who may presume to act contrary to our pleasure, hereby signified unto you."

Extract of the Company's separate Letter to Fort St. George, dated the 25th of March 1772.

Par. 34. " We have attended fully to the several circumstances noticed to us in the transactions of Messrs. Smith and Monckton, and must declare, that we cannot discover sufficient cause to mitigate our resentment at their disobedience to our commands. However, as in the course of our enquiry, we find by the Nabob's complaint, that other of our Servants may have been guilty of the same unwarrantable conduct, as is charged in particular on Messrs. Smith and Monckton, we shall for the present content ourselves with directing, that you forthwith require Messrs. Smith and Monckton, to make ample restitution of all sums which they may have received for interest over and above £ 10 per cent. per annum, as restricted by our Orders of May 1766.

- Par. 35. " It is likewise our pleasure, that you renew your application to the Nabob, and desire, that he will give a full explanation of the *et cetera*, added to the names of Smith and Monckton, in his Letter to our President, of 30th September 1770; and that he will specify not only the name of every offender, but the nature and extent of his offence, in regard to his Excellency's general charge, that the conduct of our Servants in this respect had been prejudicial to himself, and hurtful to the Company's Jaghire; and if it shall appear, that any other persons have presumed to disregard our Orders of May 1766, you are, as in the case of Messrs. Smith and Monckton, to require them to refund all such sums as they may have received for interest contrary to our express exhibition.
36. " We further direct, that you lay before us, all such information as you may acquire from the Nabob; and that you endeavour by every means in your power, to discover those transactions upon which his Excellency has founded his accusation against our Servants; and we shall suspend our determination on the degree of punishment which Messrs. Smith and Monckton have merited by their disobedience to our commands, until, by the information we shall receive concerning the conduct of others, we may be enabled to judge how far the particular circumstances which you suppose to distinguish the transactions of Messrs. Smith and Monckton, afford any plea for a mitigation of our resentment. But as we intend not hereby to weaken the force of our Orders of the 17th of May 1766, or those of April 1771, respecting *interest of money*, we hereby confirm, and peremptorily require, that you do not delay the execution of those Orders, wherever any of our Servants, or others under our protection, appear to have acted in opposition thereto."

Extract

*Extract of the Company's General Letter to Fort St. George, dated the 11th
of June 1777.*

- Par. 18. " It is our further Order, That no Company's Servant, or any person under the Company's protection, be permitted to lend money to any of the Country Powers in India, nor to any person or persons holding Commissions under, or employed by them, directly or indirectly, to be repaid at a future time, on mortgages, or securities in the nature of mortgages, upon lands, or from the produce, or any growing revenue of the Country ; and in case any of the Company's Servants are now concerned in any such Loans, as aforesaid ; such Servant or Servants shall draw up a specific and particular account current, of the whole transaction from the beginning, setting forth how such Loan or Loans is or are secured, to be delivered to our President and Council within thirty days after this regulation shall be made known, and before such person or persons shall proceed to recover such *money* ; and afterwards they shall and may proceed to recover the same, as they shall think fit.
19. " And for the more effectually preventing such Loans, we hereby direct, that you inform all the Country Powers, with whom such transactions may be likely to take place, of this regulation ; and request them not to have or permit any dealings of the nature above-mentioned, with any of the Company's Servants, or with persons under the Company's protection.

" Whether the Nabob, or any of his people, have paid to any of the Company's Servants an higher rate of interest for money than ten per cent. per annum, except to Messrs. Smith and Monckton (whose case

Eleventh
Object of
Enquiry.

has

has been already before the Court) since the arrival of Orders forbidding the receipt of exorbitant interest; and if so, to whom, and to what amount?"

*Extract of the Company's General Letter to Fort St. George, dated the
4th July 1777.*

Par. 23. "In addition to our Orders respecting money transactions, we direct, That you forthwith cause so much of the late Act of Parliament, of the 13th of George the Third, as relates to Loans of money, to be translated into the Country languages, and published at Fort St. George, and at every subordinate Factory and place to which the authority and influence of the Company extends, if it has not been already done; and that you take care, so far as in you lies, that the letter and spirit of the regulations therein contained be strictly observed by every British subject on the coast of Coromandel. And as the above-mentioned Act of Parliament permits the taking of twelve per cent. per annum for the interest of money, we hereby revoke so much of our Orders of the 17th May 1766, as restrains our Servants from accepting or receiving a higher rate of interest than ten per cent. per annum."

Mr. Benfield never was in any situation of power or authority in the Company's service, nor was he ever entrusted with the receiving or managing any of the Company's cash. During a long residence in India he had acquired considerable knowledge of the trade of that country, in which he had embarked himself very deeply, and by large and extensive dealings and strict punctuality had secured the confidence of the Black merchants in a degree seldom experienced by any European. His credit was extensive, because it was founded in honesty and fair dealing. He possessed no power or authority to enforce his demands, nor had he the command of the Company's cash to extend his credit.

In

In this situation he continued till the year 1773, acquiring a fortune by the extent of his trade, and the fruits of an honest industry, having little or no connection with the Nabob. In 1773, the Dutch laid claim to a certain part of the Tanjore country, by virtue of certain securities granted, and sales made to them, by the Rajah of Tanjore. The Nabob, supported by the Company, was upon the point of engaging in a war for the recovery of those districts ; and the Dutch were collecting forces from all quarters, in order to defend them. The two armies were on the point of taking the field ; various attempts had been made towards an accommodation, which had failed ; the Dutch demanded the repayment of the money they had advanced to the Rajah, and for which the districts had been conveyed to them ; the Nabob had not the money to pay them ; he offered security, but it was rejected. In this situation of affairs the Nabob applied to Mr. Benfield. Mr. Benfield, jointly with a Soucar, became security to the Dutch for the sum they demanded ; their security was accepted of, and peace was restored to the Carnatic.

The Report of the Governor and Council upon this transaction is as follows :

" As it appears by the foregoing treaty, that Mr. Paul Benfield, jointly with a Soucar, has engaged to discharge the money which the Nabob has engaged to pay to the Dutch, the President thinks it necessary to acquaint the Board, that the Nabob informed him, during the course of the negociation, he had requested the assistance of Mr. Benfield in raising the money to comply with the demands of the Dutch ; and the President has reason to believe, that unless Mr. Benfield had exerted himself in this business, it would not have been in the Nabob's power to have accommodated matters so soon with the Dutch."

In consequence of this transaction, which was thus known to, and approved of, by the Governor and Council, Mr. Benfield became involved in a series of money-transactions with the Nabob, and upon many different occasions assisted the Nabob with money to make good his payments to the Company. He advanced money to pay the prize-money due to the troops at the taking of Tanjore ; he advanced money for the use of the troops, and for the fort expences.

These debts stood partly paid and partly unpaid till 1775, when balances were struck, and bonds granted for those balances.

By the custom of the country, a certain share of the crop is the property of the Government ; and this share it is usual to assign annually to creditors for their payment, at the commencement of the year or crop. The various sums due to Mr. Benfield upon bonds granted at the different settlements of his accounts during the course of the year 1775, were formed into one total at the time of making the necessary arrangements respecting the crop of the ensuing year ; and fresh perwannahs (or securities) were then granted upon that crop, in conformity to the above-mentioned custom of the country. The total remaining due to Mr. Benfield at this time, was part of the original Loans secured upon the revenues of Tanjore. Therefore, though by the statement of the account it would, to a person ignorant of the mode of granting securities in that country, appear that Mr. Benfield's debts were new Loans, yet they were only balances of various old debts, for the payment of which securities were granted upon the Government share of the crop that was soon to be reaped. Securities in that country are not like mortgages in this country ; they extend no further than as liens upon the crop then on the ground. And by looking into the proceedings of the Nabob with his private European

creditors in 1767 and 1768, it will be seen that the Nabob's securities were renewed every year.

All this was done openly and avowedly on the part of Mr. Benfield.

Besides these, there is another class of debts due to Mr. Benfield by the Nabob. By the custom of the East, the Prince of the country advances money to the inhabitants to enable them to cultivate the ground: when the crop is gathered, this money so advanced is a charge upon it. The Nabob being unable to make the necessary advances, Mr. Benfield was applied to. He advanced the money to the Nabob's Son, then Naib or Manager of the country, and represented his Father to all intents and purposes, and took his bond for the time the Naib lent the money to the different inhabitants, from whom he took securities on their crop, which he assigned to Mr. Benfield by way of collateral security.

Had Mr. Benfield not advanced this money, the assignment lie had received from the Nabob would have been ineffectual, the ground would have remained waste, the Government share of the crop would have been nothing, and Mr. Benfield's debt must have remained unpaid. Upon those debts Mr. Benfield never received an interest of more than £. 10 per cent. nor were any of those who were in power and authority in the Company's Service any way connected with him in those Loans, nor did he ever make any Loans to any of the Nabob's tenants.

Your Opinion to the following Queries is requested:

QUERY I. Are you of opinion, that the Order of the year 1714 remains in full force; or are you of opinion, that it is virtually repealed by the Order 1766, and the subsequent Order?

QUERY II. If you are of opinion, that the Order of the year 1714 was destroyed by the Order of 1766, what force is to be given to the Proclamation made at Fort St. George in 1769 by the President and Council ?

QUERY III. Does it appear from the facts in this Case, that the Proclamation in 1769, of the President and Council, can be looked upon as an Order of the Company? Or, if such a Proclamation can be looked upon as a revival of the Order of 1714, is it not again virtually repealed by the subsequent Orders of 1772, which declare the Orders of 1766 to be in full force?

QUERY IV. Can the Orders of the Company of 1771, be construed to extend to Loans made by persons in Mr. Benfield's situation? Or do they appear to be confined to military Officers only?

QUERY V. Upon the whole of the Case, are you of opinion, that Mr. Benfield's Loans, as above stated, are warranted by the Company's Orders?

QUERY VI. What operation is to be given to 13th George III. and to the construction put upon it by the Company in 1777; and whether it extends to protect the Loans made by Mr. Benfield?

Note. Mr. Benfield's Loans were all previous to 1777. You are requested to peruse the Report of the Committee of Correspondence of the India Company respecting Mr. Benfield; which is sent herewith.

The ATTORNEY GENERAL's Opinion.

THE universal practice which, for a great length of time previous to the year 1766, had obtained, of lending money to the Country Governments, with the knowledge as well of the Governor and Council of Fort St. George as the India Company, and without any objection, or the repetition of the Order of the 27th of September 1714, which, by the terms of it, was to be repeated frequently in all places, furnish the strongest presumption, that from the change of circumstance since that period, or other causes, that Order was considered by all as not having any effect. But if it could be supposed, notwithstanding the disregard paid to it, to have continuance, or capable of being enforced, I am of opinion, the Order contained in the Letter of the 17th of May 1766 amounts to a virtual repeal of it.

The Order of 1766 is totally incompatible with the Order of 1714. The Company proceed to regulate the quantum of interest to be paid by the Nabob on Loans by the Servants of the Company, which would be absurd if the Order of 1714 prohibiting such Loans was deemed to be in force. The Order of 1766 permits Loans, provided the interest be restricted to £. 10 per cent. This too is repugnant to the Order of 1714. The Letter of the 17th March 1769, though expressive of great alarm from the magnitude of the debt due from the Nabob to the Servants of the Company, does not suggest an objection or idea that the Loans were made in violation of any existing Order of the Company; on the contrary, this Letter supposes the debts to be legal and valid, by directing the Select Committee to see that no higher interest than after the rate of £. 10 per cent. be charged from the day of receiving the Order of the 17th March 1766.

The Order of 1714 being repealed, as I conceive it to have been, I think the President and Council at Fort St. George could not revive it, and give it in the force and effect of an Order of the Directors. How far the President and Council of Fort St. George are authorised to make an Order of this import, it is impossible for me to form an opinion upon, without seeing the powers given to them by the Company; but it does not appear to me likely they should be invested with a controul over the express directions of the Company, or the Court of Directors, upon the subject of Loans, in the Letter of 1766, and which is confirmed in 1772. I conceive the Order in 1771 does not extend to a person in the situation of Mr. Benfield; it seems to me to have for its object persons having military commands. It appears to me, that Mr. Benfield's demands are not repugnant to any Orders of the Company in force at the time of the transactions, and that they are not liable to objections on that score. The Act of the 13th of the present King, regulating the rate of interest, and limiting the same to £. 12 per cent. does not appear to me to have any operation upon the Loans made by Mr. Benfield, as the same were made at an interest within the limitations prescribed by the Act. The Letter from the Company on that subject, is a further confirmation of the Order of 1766.

January 6,

1781.

J A. WALLACE.

Mr.

Mr. KENYON's Opinion.

QUERY I. Are you of opinion, that the Order of the year 1714 remains in full force; or, are you of opinion, that it is virtually repealed by the Order 1766, and the subsequent Orders?

ANSWER. There is so much contradiction in the Company's Orders, that I cannot forbear suspecting that they have been adapted from time to time to answer some by-purposes of persons of weight in the Direction. But taking them as I find them here stated, I am of opinion, That the Order of 1714 is virtually repealed by the several subsequent Orders, which suppose that to be legal *sub modo*, which that Order absolutely prohibited.

QUERY II. If you are of opinion that the Order of the year 1714 was destroyed by the Order 1766, what force is to be given to the Proclamation made at Fort St. George in 1769, by the President and Council?

ANSWER. The President and Council are subordinate to the Directors; and as the Directors regulated, and thereby virtually permitted what was absolutely prohibited by the Order of 1714, I do not think that the Proclamation of the Governor and Council can be considered as restoring the force of the Order of 1714, in opposition to the repeal or relaxation of that Order by the Court of Directors.

QUERY III. Does it appear from the facts in this Case, that the Proclamation in 1769, of the President and Council, can be looked upon
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as an Order of the Company ; or, if such Proclamation can be looked upon as a revival of the Order of 17:4, is it not again virtually repealed by the subsequent Orders of 1772, which declare the Orders of 1766 to be in full force ?

ANSWER. This is virtually answered by what I have written in the preceding Query. Supposing the Proclamation of 1769 to have controlled the Orders of 1766, yet the Orders of 1772 would restore those of 1766.

QUERY IV. Can the Orders of the Company of 1771, be construed to extend to Loans made by persons in Mr. Benfield's situation ? or, do they appear to be confined to Military Officers only ?

ANSWER. Mr. Benfield not having lent money to the Nabob's tenants, does not fall within the prohibition of these Orders.

QUERY V. Upon the whole of the Case, are you of opinion, that Mr. Benfield's Loans, as above stated, are warranted by the Company's Orders ?

ANSWER. The acquiescence of the President and Council in these Loans, which they seem to treat not only as legal but as meritorious ; and the silence of the Court of Directors,} who should have reprimanded them when they came before them, in case they had been reprehensible, evince, that these bodies of men thought them legal.

QUERY VI. What operation is to be given to 13 Geo. III. and to the construction put upon it by the Company in 1777 ; and whether it extends to protect the Loans made by Mr. Benfield ?

Note. Mr. Benfield's Loans were all previous to 1777. You are requested to peruse the Report of the Committee of Correspondence of the India Company, respecting Mr. Benfield, which is sent herewith.

ANSWER. I wish the clauses of the Statute, upon which any thing respecting this question is supposed to turn, had been pointed out. It contains regulations in respect to the rate of interest to be taken; but I do not perceive any thing in it which affects this Case.

Lincoln's-Inn;

Jan. 4, 1781.

L. KENYON.

The Hon. THOMAS ERSKINE's Opinion.

QUERY I. Are you of opinion, that the Order of 1714 remains in full force; or are you of opinion, that it is virtually repealed by the Order of 1766, and the subsequent Orders?

ANSWER. Whenever a law of strict and entire prohibition, is followed by a law of regulation on the same subject, which could neither have been necessary, nor have had any thing to operate upon, if the prohibition remained in its original force, the prohibition is not only by construction of law, but in the apprehension of common sense, virtually repealed by the regulation, as far as they are inconsistent and repugnant: For inconsistencies cannot stand, and the latest promulgation is the rule of action. As interest cannot grow but from Loan, an Order fixing

fixing the limitation of interest is ridiculous, if, by an antecedent Order of equal authority which is not repealed by it, no money can be lent.

The law that says you shall not take above £. 10 per cent. necessarily admits, not only that lending is legal, but that £. 10 per cent. may be legally taken; for a regulation is (in other words) a partial, qualified prohibition, and implies the legality of that which it does not prohibit.

From the Preamble of the Order of 1766, it is evident that the Company did not consider the Order of 1714 as still binding on their Servants. It states, that they had reason to believe that many of them accepted presents from the Nabob, his Ministers, or others, in a collusive manner, by way of exorbitant interest on monies lent. This species of usury was the evil avowedly to be prevented; and the Preamble accordingly goes on to say, that the Order was in fact made to put a stop to *such extortions and exactions*. And, therefore, although the directory part which follows, is a general regulation of the rate of interest in the country, whoever might be the borrower; yet it is plain from the introductory part, that the Company, while they were framing it, had particularly in their notice and contemplation, that Loans were daily made by their Servants to the Nabob and his Ministers; which, nevertheless, they do not reprobate and condemn by holding up the antiquated Order of 1714, but only restrain the abuse of them, by publishing a regulation which was in its nature incompatible with the existence, or observation, of the original prohibition; for, if that Order against all such Loans had still been in force, no man could have taken a present from the Nabob or his Ministers under the legal pretext of interest, since the pretext itself would have been as illegal as the present it was intended to cover.

I have therefore no scruple in saying, that the Order of 1714 is virtually repealed by the above-mentioned Order of 1766; and that the other Orders of the Company on the same subject, up to the final prohibition of 1777, strengthen and confirm that construction of it.

QUERY II. If you are of opinion, that the Order of 1714 was destroyed by the Order of 1766, what force is to be given to the Proclamation made at Fort St. George in 1769 by the President and Council?

ANSWER. If I am right in my opinion, that the Order of 1714 was virtually repealed by that of 1766, it will follow, that the Proclamation of the President and Council of Fort St. George in 1769, which holds the contrary, yet which sets up no authority of its own, but operates only as a commentary on the Orders of the Company, must be void.

Whether the President and Council can only promulgate and enforce the Instructions of the Company, or whether they have a legislative authority in themselves, is immaterial to the present Question; since, whatever may be their jurisdiction upon subjects where the Instructions of their Superiors are silent, they certainly cannot alter or repeal them in cases where they have made positive regulations; much less can they render men criminal, by an absurd, unwarrantable construction of them, contrary to their plain, unambiguous letter.

The Proclamation of the President and Council at Fort St. George in 1769 does not pretend to be a new prohibition issuing by their own authority; nor a republication of the Order of 1714 by the command of the Court of Directors; but is founded on what they are pleased to consider as a vulgar error; namely, the virtual repeal of the Order of 1714, by that of 1766. For they recite the Letter, and say, that the

Company having directed by it, that the rate of interest upon Loans should not exceed £. 10 per cent. without expressly repeating the prohibition against lending at all, doubts had arisen concerning the validity of the original prohibition.

That doubts should have arisen, is not surprising to such as reflect, that, if money could in no instance be legally lent, there could be no legal standard for the compensation of lending; and their attempt to remove such doubts, and to republish such prohibition, by merely putting such a construction on the Company's Order of 1766 as it cannot possibly bear, without setting up any original authority of their own to render their Proclamation binding, further than it explained the Order which it recited, I consider to be utterly void.

It is strongly in favour of the Opinion I have given, That in the Company's Letter, of the 17th of March 1769, to the Select Committee at Fort St. George, which immediately preceded the Proclamation in question, and which probably gave rise to it; after reprobating the conduct of the Governor and Council in becoming the Trustees of individuals to the prejudice of the public revenue, and after stating every argument to be used with their Servants for the suppression of such transactions with the Country Powers as clashed with the interest of their Employers, they neither directly nor indirectly hold up to them the original universal prohibition, which (if it had existed) would have rendered all other arguments unnecessary; but, on the contrary, conclude with desiring a separate scrutiny into the debts due from the Nabob to every individual in their service, with a direction that such debts (*which would have been no debts at all, if the money had been lent in defiance of the Order of 1714*) should carry no greater interest than £. 10 per cent. from the date of the Order of 1766.

QUERY III. Does it appear from the facts in this Case, that the Proclamation in 1769, of the President and Council, can be looked upon as an Order of the Company ; or, if such a Proclamation can be looked upon as a revival of the Order of 1714, is it not again virtually repealed by the subsequent Orders of 1772, which declare the Orders of 1766 to be in full force?

ANSWER. If I am right in my discussion of the former Question, the present requires no Answer ; since, if the Proclamation of the President and Council at Fort St. George in 1769, had no effect on the Company's Order of 1766, it required nothing subsequent to support it.

The Orders however of 1772 confirm me in the judgment I have given on that subject ; since, though published three years subsequent to the supposed revival of the prohibition against lending, they do not consider *the Loans themselves* as constituting any part of the offence of Messrs. Monckton or Smith, or of any of their other Servants, which they were intended to punish and to correct ; but confine their displeasure entirely to the usurious breach of their Order of 1766, for fixing the rate of interest at £. 10 per cent. ; a conduct in my opinion utterly incompatible with the existence of the original Order of 1714, as a subsisting rule of action.

QUERY IV. Can the Orders of the Company of 1771, be construed to extend to Loans made by persons in Mr. Benfield's situation ? Or, do they appear to be confined to Military Officers only ?

ANSWER. The Order of the 10th of April 1771, which alone applies in the remotest degree to Mr. Benfield's case (that of the 10th of March in the same year being expressly confined to the current ac-

counts of Military Officers), does not appear to me to impeach his conduct.

Laws must be construed according to their reason and spirit, where they are obvious, though the legislator does not express them; much more if, as on this occasion, he does express them in the most unambiguous terms.

It appears by the Company's Letter of the 10th of April 1771, which contains the Order in question, that disturbances which had occasionally happened in the Carnatic in the absence of the Company's troops, had induced the Nabob to consent that a proper number of his Sepoys should be disciplined and commanded by European Officers, to be defrayed at his expence; and that if the Company agreed to it, and would give directions that their *Military Officers* should not interfere in the affairs of his revenue, he would dismiss all the troops which he kept in the country, and trust to the Company for the tranquillity of the Carnatic.

It appears likewise, that the Nabob afterwards wished that the Company's troops should evacuate the Forts in the Carnatic, and that he had obtained a promise from the Governor and Council at Fort St. George to that effect, but which this Letter refuses to confirm; yet considers the above-mentioned agreement as binding, unless the Nabob could urge with propriety (which they hoped was not the case), that their *Military Officers* had improperly interfered in the business of his revenue.

The words *Military Officers* are to be particularly attended to, because they shew that the Nabob's jealousy was confined to the conduct

of some of the Company's Servants in high Military command, who took mortgages under the range of their cannon ; and therefore, to fulfil their part of the condition, and to quiet the apprehensions of the Nabob, who had objected to the conduct of some of their Officers in that respect, the Company issued the Order in question ; not to prevent Loans to the Nabob's tenants and people in the country in general, but to any of the Nabob's tenants and people in the country where such Officer or person happened to be ; avowedly lest the individual thereby prohibited should carve for himself by the sword, or by the awe of his authority, before the Nabob could secure his proportion : the very practice which he had complained of to the Company, and which induced him to make it part of the stipulation with them, on dismissing his own troops and trusting the Carnatic to their defence, that they should prohibit those Military Servants, whom such an arrangement would necessarily invest with authority in these countries, from lending money to his tenants and people without his sanction, lest they should secure their own property before he could collect his revenue.

This Order cannot therefore, by the most strained constructions, apply to Mr. Benfield's Loans at Tanjore, which were so far from being within the evil which it was made to prevent, so far from being an infringement of a law made singly to protect the Nabob of the Carnatic from the oppression of persons in authority under the Company in these provinces to the prejudice of his revenue, that the money was actually lent, *not to the tenants or people at all*, but to the Nabob himself, to enable the inhabitants of Tanjore to cultivate the country, without which he would have had no revenue at all; and for which, so far from obtaining, from the tenants and natives, private securities to the Nabob's prejudice, which the Order was expressly made to prevent, their obligations

gations to him were only as collateral security to the bonds of his second son Ummeer-al-Omrah, the Naib or Manager of the country.

I am, therefore, most decidedly of opinion, that Mr. Benfield has not disobeyed the Company's Orders of the year 1771.

QUERY V. Upon the whole of the Case, are you of opinion, that Mr. Benfield's Loans, as above stated, are warranted by the Company's Orders?

ANSWER. My Answers to the former Questions having already emancipated Mr. Benfield's transactions from the above-mentioned Orders; and as that of 1777, the only one that remains behind, cannot, as being subsequent to all the Loans in question, criminate him by retrospection, I must necessarily be of opinion, that he has not been guilty of a breach of any of the Company's Instructions.

This is sufficient to say as a Lawyer. But, after having attentively read the Report left with the Case, which appears to be composed of Extracts from the Records of the Company, I cannot, in justice to Mr. Benfield, forbear expressing my regret as a man, that his conduct, which appears to have been in some instances highly public-spirited, in others very beneficial to the interests of his Employers, and in none detrimental to them, should be thought a fit subject of such a severe and uncommon scrutiny, at such a distance of time, after having in every part of it received not only the express sanction of their Government abroad, but their own implied approbation at home, to be gathered from their suffering him to remain in their service unimpeached and unreproved, although that very Government of Fort St. George, which had ratified his conduct, fell under their displeasure, and were recalled

from the East; and although when so recalled, that ratification was neither directly nor indirectly imputed to them as contrary to the duties of their trusts.

This observation, however, is no censure on the Company. Mr. Benfield was recalled, that an enquiry might be made into whether he was concerned in the late Revolution at Madras; and the piercing eye of the highest criminal Court in the country not having found, in the investigation of the causes of that event, any one fact to stain his character even with suspicion, and the suggestion on which he was suspended not having been in any other way brought forward in proof against him, the Majority of the Directors have done their duty, by restoring him to the Service.

From this restoration, I understand, there is an Appeal to the Court of Proprietors, which, if not supported by evidence of fraud, extortion, or corruption, cannot, I think, be successful on any of the grounds stated to me in this Case. It is, indeed, not a pleasant thing to see men in a free country (and such there certainly are on the present occasion) looking forward with a malignant hope, that transactions which neither interest nor malice have been able to impeach, or even to charge with dishonesty, should be reprobated and condemned, and their inoffensive Author undone, by the penal operation of a dormant and exploded law, which, even if it did continue to exist (though it certainly did not), the most faithful and applauded Servants of the Company never obeyed.

QUERY VI. What operation is to be given to 13th Geo. III. and to the construction put upon it by the Company in 1777; and whether it extends to protect the Loans made by Mr. Benfield?

ANSWER.

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ANSWER. I think the Act of Parliament does not affect the question one way or the other. It only fixes the general rate of interest in India at £. 12 per cent. without relation to who may be the lenders, or who the borrowers ; and the Company accordingly altered their Orders to the same standard.

Serjeant's-Inn, Jan. 4,

1781.

THOMAS ERSKINE.

